United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2374

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

PIETRO C. RUBINO, for himself and all other persons similarly situated, et al.,

Plaintiffs-Appellants,

HARRY T. NUSBAUM,

Plaintiff-Intervenor-Appellant,

-against-

JOHN J. GHEZZI, et al.,

Defendants-Appellees.

- x

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BRIEF FOR PLAINTIFFS-APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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PRELIMINARY STATEMENT

This is an Appeal from an Order entered in the United States District Court for the Southern District of New York by Hon. Thomas P. Griesa denying plaintiffs' request for a three-judge court and dismissing the action.

ISSUE PRESENTED

One issue is presented. Plaintiffs challenge the constitutionality of New York State's law mandating the

retirement of elected judges prior to the expiration of their elected term of office. Plaintiffs, a voter and a judge, challenge the constitutionality of this law on First and Fourteenth Amendment grounds. The issue on appeal is whether plaintiffs' arguments require the convention of a three-judge court.

STATEMENT OF CASE

The facts are simple and not likely to be in dispute. Plaintiff Zichello was elected to a ten-year term as a Judge of the New York City Civil Court on November 4, 1969 (A5). Except for the challenged State statute and constitutional provision, his term would not expire until December 31, 1979. N. Y. State Const. Art. 6, §15. The challenged State constitutional provision, Art. 6, §25, mandates that elected judges on the following state benches retire at the end of the calendar year in which they reach the 70th anniversary of their birth: Court of Appeals, Supreme Court, County Court, Surrogate's Court, Family Court, New York City Civil and Criminal Courts and District Court.* N. Y. Judiciary Law §23 substantially restates this requirement.

*Members of the Family Court in New York City and of the New York City Criminal Court are appointed by the

The constitutional provision permits Court of Appeals Judges and Supreme Court Justices to "perform the duties of a justice of the supreme court" until the end of the calendar year in which they reach age 76. But it must be "certificated . . . that the services of such judge or justice are necessary to expedite the business of the court and that he is mentally and physically able and competent to perform the full duties of such office." N. Y. State Const. Art. 6, §25(b). This exception does not apply to Judge Zichello, who, nevertheless, is mentally and physically able and competent to perform his duties (A8). There are apparently no age limits on other elected officials. In fact, in the last election men over 70 were elected Senator, Comptroller and Attorney General.

Plaintiff Rubino is a voter from the district that elected Zichello. He voted for Zichello. He is over 70 years of age. He brings this action as a class action on behalf of two classes of people: (a) all eligible voters

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(Footnote cont'd.) Mayor. N. Y. Family Court Act, §123. N. Y. Criminal Courts Act §22. The retirement provisions also apply to Court of Claims judges, who are appointed by the Governor. N. Y. Court of Claims Act, §2. The age limitation in New York's law apparently stems from 1822, though research indicated no express justification for it. People ex rel. Lawrence v. Mann, 97 N.Y. 530, 532 (1885). See the Appendix to this Brief for an analysis of retirement statutes in other states.

over the age of 70; and (b) all persons who voted for Zichello in 1969. (A4-A5.)

Relief Requested Below

Plaintiffs requested the lower Court to declare the New York State law unconstitutional only in so far as it mandated the retirement of an elected judge prior to the expiration of his elected term, solely on the basis of his reaching age 70. Zichello sought this relief in his own name. Rubino sought this relief in his own name and on behalf of all eligible voters in New York State over age 70.

Plaintiffs also requested the lower Court to enjoin the application of these mandatory retirement provisions against Zichello and to prevent the selection of a successor. Rubino sought this relief in his own name and on behalf of all persons who voted for Zichello. Zichello sought this relief in his own name.

The Order Below

On the return day of the Order to Show Cause, Hon. Thomas P. Griesa denied the motion to convene a three-judge court and dismissed the action. He gave a statement

of his reasons on the record (A21-A27) and subsequently endorsed the denial and dismissal on the Order to Show Cause (A20).

ARGUMENT

Procedural Issues

(a) Jurisdiction

The District Court had jurisdiction under 28 U.S.C. §§1331, 1343, 2201 et seq. This action seeks to vindicate rights protected by the First and Fourteenth Amendments to the United States Constitution and by 42 U.S.C. §1983. The amount in controversy, in so far as this action is based on 28 U.S.C. §1331, exceeds $10,000 exclusive of costs and interest (A4). Zichello's annual salary is far greater than the jurisdictional amount (A8).

(b) Three-Judge Court

The District Court declined to convene a three-judge court. In Goosby v. Osser, 409 U.S. 512, 518 (1973) the Supreme Court said that a three-judge court should be denied only if the constitutional attack is "insubstantial." Constitutional insubstantiality, said the Court, meant that the

claim was "essentially fictitious," "wholly insubstantial," or "obviously frivolous." These words, said the Court

> import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. §2281. A claim is insubstantial only if "its soundness so clearly results from the previous decisions of the court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy."

At least 8 federal judges have indicated their belief that some of the following arguments raise substantial constitutional issues. Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974) (Burger, Ch. J. and Rehnquist, J. dissenting); Weisbrod v. Lynn, 494 F. 2d 1101 (D.C. Cir. 1974) (reversing and remanding for a convening of a three-judge court in a similar action). Murgia v. Commonwealth of Mass. Bd. of Retirement, 376 F. Supp. 753 (D. Mass. 1974) (declaring unconstitutional a state law requiring police officers to retire at age 50).

In each of these cases, the person challenging the law was a civil servant or the hypothetical involved a civil servant. The arguments in the present case are substantially stronger because Zichello is an elected official. The exact issue here is not whether mandatory retirement statutes are ever acceptable, but whether they may be used to force a

person, elected to a public office, to leave his office before the expiration of his term. This narrower issue raises the Fourteenth Amendment questions discussed by the federal judges in the cases cited above and, in addition, important First Amendment questions. The First Amendment questions depend, in part, on recent United States Supreme Court decisions dealing with the rights of voters and the rights of candidates.

On remand in Weisbrod, the three-judge court dismissed the action on the basis of the Supreme Court's decision to deny an appeal for want of a substantial federal question in McIlvaine v. Commonwealth of Pennsylvania, 415 U.S. 986 (1974). There, the Pennsylvania Supreme Court had affirmed a lower Pennsylvania Court's opinion rejecting plaintiff's challenge to a law that required policemen to retire at age 60. The only federal issue raised in the lower Pennsylvania Court's opinion was whether the Federal Age Discrimination in Employment Act was violated by the state law. But according to the three-judge Court in Weisbrod, the issue presented in the plaintiff-appellant's jurisdictional statement to the United States Supreme Court in McIlvaine raised equal protection and, by inference (said the Weisbrod Court), due process arguments. The Weisbrod Court, therefore, felt obligated to

dismiss because it believed that the Supreme Court's action in McIlvaine was controlling on the issue of the substantiality of the federal question.

Whatever the identity of issues may be between Weisbrod and McIlvaine, this case is different. Three of plaintiffs' four arguments here rely on the elective nature of plaintiff Zichello's position. These arguments rely on cases dealing with the rights of voters and the rights of candidates. These are First Amendment theories, not Fourteenth Amendment ones. They were wholly absent from Weisbrod and McIlvaine. Plaintiffs' fourth argument, relying on due process and equal protection theories, differs from the related argument in Weisbrod and McIlvaine, for a crucial reason subsequently discussed.

(c) Class Action

Rubino sues on behalf of (i) other voters for Zichello, (ii) all eligible voters in the State more than 70 years old. The basis for class action treatment is Rule 23 (a) and (b) (2) FRCP. With regard to Rule 23 (a), each class is too numerous to allow joinder, the questions of law and fact are common to the class, Rubino's claims are typical of the claims of the class and he will fairly and adequately represent its interests. With regard to

Rule 23(b) (2), defendants are acting and refusing to act on grounds generally applicable to each class making declaratory and injunctive relief with respect to each class appropriate (A5). Nicholls v. Schaffer, 344 F. Supp. 238, 240 (D. Conn. 1972) (3-judge Court). See Norwalk CORE v. Norwalk Redevelopment Agency, 395 F. 2d 920, 937 (2d Cir. 1968); Torres v. New York State Dept. of Labor, 318 F. Supp. 1313, 1318 (S.D.N.Y. 1970); Monnell v. Dept. of Social Services, 357 F. Supp. 1051, 1054 (S.D.N.Y. 1972).

Substantive Issues: First Amendment Arguments

Zichello

(a) The State law violates Zichello's First Amendment right to seek and hold office.

Zichello has a First Amendment right to be a candidate for public office and, once elected, to conclude his term. The State may limit this right only by showing a compelling State interest. There is none.

This argument depends on the existence of a constitutionally protected right to be a candidate for public office. If there is such a right, statutes affecting its exercise must "be narrowly tailored to their legitimate objectives." Police Department of Chicago v. Mosley, 408 U.S. 92, 101 &

101 n.8 (1972). In short, two of the nonfrivolous questions this case raises are (i) whether there is a First Amendment right to be a candidate for public office, and (ii) if so, what limitations on candidacy a State may legitimately impose.

A number of lower Federal Courts have held that there is a First Amendment right to run for public office. United Ossining Party v. Hayduk, 357 F. Supp. 962 (S.D.N.Y. 1971) (3-Judge Court) (alternate holding). Mancuso v. Taft, 476 F. 2d 187, 195 (1st Cir. 1973). Briscoe v. Kusper, 435 F. 2d 1046, 1054 (7th Cir. 1970). Headlee v. Franklin County Board of Elections, 368 F. Supp. 999, 1003 (S.D. Ohio 1973) (3-Judge Court). Blassman v. Markworth, 359 F. Supp. 1, 8 (N.D. Ill. 1973) (3-Judge Court)(Swygert, Ch. J. concurring).

The Supreme Court has not yet directly confronted this issue. Until recently, it has chosen to analyze the rights of candidates in terms of the rights of voters, a question also raised here and discussed later. Bullock v. Carter, 405 U.S. 134, 144 (1972). Williams v. Rhodes, 393 U.S. 23, 30-31 (1968).

Last term, in Communist Party of Indiana v. Whitcomb, 414 U.S. 441, 448-50 (1974) and in Storer v. Brown, 415 U.S. 724, 738 (1974), the Court moved away from an analysis limited

solely to the effect of candidacy restrictions on voters, and seemed to indicate that candidates themselves had constitutionally protected rights. In Whitcomb, a political party could not gain access to the ballot in Indiana unless its officers signed an overbroad loyalty oath. The State argued that the prohibition on such oaths should "not obtain in cases of state regulation of access to the ballot." The Supreme Court disagreed. "At stake," it said, "are appellants' First and Fourteenth Amendment rights to associate with others for the common advancement of political beliefs and ideas. . . . Thus, burdening access to the ballot, rights of association in the political party of one's choice, interests in casting an effective vote and in running for office . . . is to infringe interests certainly as substantial as those in public employment, tax exemption, or the practice of law." (Emphasis added.)

In Storer v. Brown, supra, the Court had to consider, among other things, ballot access limitations imposed on independent candidates rather than, as in Williams v. Rhodes, on political parties. The Court held that "the requirements for an independent attaining a place on the general election ballot can be unconstitutionally severe." It remanded the case in part to determine whether that was so. The Court did not say whether its analysis depended on the rights of

voters or of candidates. It is noteworthy, though, that the limitations on access in Storer did not apply to parties or groups, but to particular individuals. This difference makes a strict voter-oriented analysis more difficult, if not impossible, to apply, and suggests that the Court is willing to accept a First Amendment candidate-oriented approach. See also Lubin v. Panish, 415 U.S. 709, 716 (1974) ("The right of . . . an individual to a place on a ballot is entitled to protection. . . .")

It would be odd if candidacy were not a constitutionally protected right. The First Amendment rights of speech, petition and association find their natural outlet in office seeking. It would be anomalous if a citizen has the right to speak on issues, to associate with others in an effort to cause political change, and to petition his representatives to use their power in a certain way, but no First Amendment right to obtain for himself the very power whose exercise he hopes to affect.

If there is a First Amendment right to be a candidate for elective office, what restrictions may the State impose on candidacy? Plaintiffs do not argue that the answer is "none." But if the right to be a candidate is constitutionally protected, limitations on it must serve some compelling State interest. This case raises the non-frivolous issue whether a compelling State interest is served by using mandatory retirement statutes to terminate an elected

official's term of office prior to its expiration.

In Bullock, monetary restrictions on candidacy were invalidated. Accord, Lubin v. Panish, 415 U.S. 709 (1974). In Williams, collection of a substantial number of signatures was held an unconstitutional burden on access to the ballot. Accord, Storer v. Brown, supra. In Mancuso, Briscoe, and Headlee, other access restrictions were invalidated. In light of these cases, it is a legitimate question whether age limits serve any compelling state interest justifying infringement of an elected official's First Amendment right to conclude his term.

Rubino

(b) The State law violates the First Amendment rights of speech, petition and association, and the right to equal treatment of all eligible voters more than 70 years of age, whom Rubino represents.

As the Court indicated in Bullock v. Carter, supra at 142-44, limitations on access to elected office affect the rights of voters as well as of candidates. Here, New York's law affects the right to elect persons over age 60 to a full-term on a number of New York courts.

This argument is parallel to similar arguments made in Bullock, Williams, and Whitcomb, supra and in Kusper v. Pontikes, 414 U.S. 51, 56-61 (1973), Dunn v. Blumstein, 405 U.S. 330 (1972), Cipriano v. City of Houma, 395 U.S. 701 (1969), and Kramer v. Union Free School District, 395 U.S. 621 (1969).

It is important to distinguish among these cases. Kusper, Dunn, Cipriano and Kramer involved laws that, for one reason or another, prevented individuals from voting at all. In Kusper, a citizen was prohibited from voting in a party primary if he had voted in the primary of another party within 23 months. In Dunn, durational residency requirements conditioned the right to vote. In Cipriano, the right to vote depended on property ownership. In Kramer, the right to vote was conditioned on the ownership or rental of property, or the status of parenthood. In each case, the State law was declared unconstitutional. In each case except Dunn, the prohibition on the right to vote was partial but permanent. For example, in Kramer, persons not qualifying could not vote in school district elections. In Dunn, the disability imposed by the residence requirement was absolute but temporary.

Williams and Whitcomb involved indirect limitations on the right to vote. In each case, access of a particular

party to the State ballot was conditioned on certain factors that made access difficult or repugnant to the tenets of the party. In each case, the Court noted the effect of these hurdles not only on the party but on persons who might wish to vote for its candidates. Although these voters still retained their right to vote, the Court realistically acknowledged that limitations on ballot access necessarily limited the right to vote as well. You can't vote for someone who is not on the ballot.

Bullock v. Carter took this analysis a major step further. As in Whitcomb and Williams, there was no direct dilution of the right to vote (compare the reapportionment cases), nor was there a prohibition on the right to vote, either absolute and temporary (Dunn v. Blumstein) or partial and permanent (e.g., Kramer v. Union Free School District). The argument was more subtle.

Texas required candidates for the primary ballot to pay filing fees that ranged as high as $8,900. The Court said (405 U.S. at 143) that this tended to preclude "office seekers lacking both personal wealth and affluent backers . . . from seeking the nomination of their chosen party, no matter how qualified they might be, and no matter how broad or enthusiastic their popular support." The effect of this "limitation

would fall more heavily on the less affluent segment of the community, whose favorites may be unable to pay the large cost required by the Texas system." 405 U.S. at 144.

Bullock is important because absent the clear party associations present in Whitcomb and Williams, the Court still recognized an association of interests between economic groups. Poorer voters are inclined to vote for poorer candidates, who are seen as more nearly representative of the interests of the poorer voters.

Bullock represents a qualitative change in the analytical approach to voting cases. The Court acknowledged that, unlike Williams and Whitcomb, "disparity in voting power based on wealth cannot be described by reference to discrete and precisely defined segments of the community . . . But we would ignore reality were we not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status." (Id.)

The Supreme Court's recognition of the subtle ways in which limitations on ballot access can affect the "fundamental" right to vote (Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966)) should influence this Court's analysis in the present case. The effect of the New York State law is to prevent older citizens from electing their own members

to positions which the State has chosen to make elective. As the Supreme Court said in Kramer, supra, at 628-29:

> The need for exacting judicial scrutiny of statutes distributing the franchise is undiminished simply because, under a different statutory scheme, the offices subject to election might have been filled through appointment. States do have latitude in determining whether certain public officials shall be selected by election or chosen by appointment and whether various questions shall be submitted to the voters . . . However, "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."

Although the judiciary may be the least "representative" of the three branches of government, the State has chosen to make it elective and thereby give recognition to expressions ordinarily reflected in the vote, including choices about the maturity, frame of reference and life experience of candidates. It often happens that state courts consider issues which severely affect the rights of older persons. See, e.g., Parrino v. Lindsay, 29 N.Y. 2d 30 (1971).

The willingness of the Supreme Court to consider the identity of interests between poorer candidates and poorer voters also applies here. There is a similar identity of interests between older candidates and older voters. This is not to say that there are not young candidates who will represent the interests of older citizens and old candidates who will fail to do so. But in Bullock, the Supreme Court

also recognized that "there are doubtless some instances of candidates representing the views of voters of modest means who are able to pay the required fee." 405 U.S. at 144. Nevertheless, the Court refused to "ignore reality."

It is important to consider the size of this problem. According to the Statistical Abstract of the United States, in 1971 nearly 2 million of New York's 18 million citizens were older than 65 (p. 32). These people could not, under current law, elect one of their number to a full term on Zichello's Court (or any other court). Yet the same source says that in the United States about two out of every three people over age 65 actually vote (p. 379).

In New York, one-sixth of the eligible voters in the State (1972) were more than 65 (p. 381). One out of six voters, therefore, suffers a disability in associational and voting freedom not suffered by other voters.

In Bullock, the Supreme Court recognized that high filing fees will tend to exclude poorer candidates, and that this will tend to affect poorer voters. Here, we are not dealing with a tendency. We have an outright exclusion, and more. We have a requirement that duly elected persons leave office even prior to the expiration of their elected term.

Plaintiffs respectfully submit that the Bullock standard is this: limitations on candidacy must be weighed by reference to the State's power to impose the same disability on voters. Since, in Bullock, the State could not absent a compelling interest condition the right to vote on wealth (Harper), it could not indirectly compromise the right to vote on this basis by conditioning the right to be a candidate on wealth. Here, the State could not absent a compelling interest condition the right to vote on an age maximum. See Kramer, 395 U.S. at 626-27; Dunn v. Blumstein, supra; McDonald v. Board of Elections, 394 U.S. 802, 806-07 (1969); Goosby v. Osser, 409 U.S. at 519-20; Evans v. Cornman, 398 U.S. 420 (1970). Neither may it compromise the right to vote on this basis by creating an age maximum on the right to be a candidate.

This argument is not novel. It is the precise reasoning of the three-judge Court in Human Rights Party v. Secretary of State for Michigan, 370 F. Supp. 921 (E.D. Mich. 1973). There, a State law prohibited persons under eighteen years of age from running for election as a member of a Board of Education. Plaintiffs endorsed the candidacy of a fifteen-year-old and challenged the State law. A three-judge court was convened. The Court read Bullock this way:

> The reasoning of the Bullock Court leads us to the conclusion that the compelling interest standard is applicable to a statutory restriction on candidacy if that restriction has an indirect discriminatory impact of the sort which, had it resulted directly from a statute limiting the right to vote, would require application of the stricter standard of review of that statute.

In other words, because limitations on candidacy affect voters, the validity of these limitations must be weighed as though they had been applied to voters in the first place.

The Michigan Federal Court next had to consider whether Bullock's assumption that poorer voters are more likely to favor poorer candidates also applied to younger voters and younger candidates. The Court held that this "interest identification" did apply:

> The statute under consideration here had the indirect impact of limiting the right to vote on the basis of age since the candidates excluded are those most likely to be favored by young citizens. [Citing Bullock at 144.] Thus, we are brought to the question of whether a state limitation on the right to vote based on age must meet the compelling interest test in order to satisfy the requirements of the Fourteenth Amendment.

The Court, citing Oregon v. Mitchell, 400 U.S. 112 (1970), concluded that the compelling interest test was not required where the age limitation was a mandatory minimum. Instead, the Court applied the rational relationship test. The Court found that the State had a valid interest in "the maturity" of its office holders and in assuring that school

board members will have "the legal capacity to transact the business of the Board."

Plaintiffs respectfully suggest that the Michigan Court's analysis must in part be applied here. This Court must recognize the indirect impact of the retirement provision on voters. It must also recognize the interest identification between older voters and older candidates. The only difference between this case and the Michigan case is the appropriate test to apply.

The compelling state interest test should apply here. There is a difference between an age minimum and an age maximum. Although the state may condition the right to vote on an age minimum without showing a compelling interest, it could not establish an age maximum absent one. This is because there are real factual differences between age minimums and age maximums. With age minimums, the state is approaching a large, undifferentiated mass of people. Practically speaking, there is no other way to assure the maturity of voters. An age minimum is not an assurance, of course, but it is the best that can be done. So the courts permit it.

An age maximum differs. A state may require a voter to be 18 years old, but it cannot exclude a voter one he is,

say, 50 or 60 or 70 years old. It cannot presume the loss or disappearance of maturity for reason of age alone.

Since the compelling state interest test would have to apply to the exclusion of voters based on an age maximum, it must also apply to the exclusion of candidates. This makes perfect sense when we consider the purpose of elections. While age minimums seek to establish maturity where particularization is not feasible, the very purpose of an election is to allow the voters to make their own choice. An election provides the very opportunity for particularization that is not possible when dealing with the determination of an age minimum.

Does Bullock require federal courts to take consideration of the political reality of interest identification? Does the interest identification based on wealth differ in a real way from interest identification based on age? Should the compelling state interest test apply? Bullock raised many questions. Its ramifications will be felt for some time. The present case seeks to examine these. The argument for an extension of Bullock, if it is an extension, to the facts here is serious and timely. It is not frivolous. As the Kramer Court said, supra at 626:

> . . . statutes distributing the franchise constitute the foundation of our representative society. Any unjustified discrimination in determining who may

participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.

Substantive Issues: Fourteenth Amendment Arguments

Zichello

(c) The State law creates an irrebuttable presumption that Zichello is unable to exercise the duties of his office, in violation of the Due Process Clause of the 14th Amendment.

The mandatory retirement statute creates an unconstitutional irrebuttable presumption that Zichello cannot do the job to which he was elected. An irrebuttable presumption violates the Due Process Clause when it is "not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination." Vlandis v. Kline, 412 U.S. 441, 452 (1973). Accord, Cleveland Board of Education v. La Fleur, 414 U.S. 632, 644 (1974). Stanley v. Illinois, 405 U.S. 645 (1972). Bell v. Burson, 402 U.S. 535 (1971). Carrington v. Rash, 380 U.S. 89 (1965).

La Fleur is directly in point because it invalidated an irrebuttable presumption that a pregnant teacher could not exercise her duties four or five months prior the birth

of her child. In dissent, the Chief Justice and Justice Rehnquist suggested that the use of an irrebuttable presumption test in La Fleur would invalidate just the sort of mandatory retirement provision challenged here.

The La Fleur Court noted the absence of "individualized determination." Id. at 644. In Pordum v. Board of Regents, 491 F. 2d 1281, 1287 n. 14 (2d Cir. 1974), this Court considered a law excluding felons from teaching positions. The Court said that where there is no legislative finding, based on a comprehensive investigation, supporting a per se exclusion, exclusion of an individual from a job can be allowed "only after a detailed and particularistic consideration of the relationship between the person involved and the purpose of the exclusion." Id. This accords with the parallel requirement of a prior fair hearing before one may be denied a government right, license or benefit. See, e.g., Willner v. Committee on Character and Fitness, 373 U.S. 96, 102 (1963).

It is not necessarily or universally true that 70-year-old judges can no longer judge. Many lawyers continue with productive work long past age 70. Further, the State itself allows some judges to continue sitting to age 76. N.Y. State Const. Art. 6, §25. And the State law requirement

that it be certificated that these judges are still able to exercise their duties proves that there are "reasonable alternative means of making the crucial determination." Vlandis v. Kline, supra.

Finally, apparently no other elected officials have mandatory age limits. To the extent that all irrebuttable presumption tests border on equal protection arguments (see Powell J., concurring in La Fleur), plaintiffs assert the lack of any rational basis to distinguish between kinds of judges, and between judges, lieutenant governors, assemblymen, comptrollers, attorneys general, etc. Reed v. Reed, 404 U.S. 71 (1971); Whitcomb, supra, concurring opinion; Weiss v. Walsh, 324 F. Supp. 75, 78 (S.D.N.Y. 1971) aff'd 461 F. 2d 846 (2d Cir. 1971); Ali v. Division of State Athletic Commission, 316 F. Supp. 1246 (S.D.N.Y. 1970). Weiss v. Walsh rejected the broad argument that mandatory age limits are always a denial of equal protection to persons over the limit compared to persons under it. That argument is not made here. The arguments here are all much narrower, including the argument, recognized in Weiss (324 F. Supp. at 78), based on Ali, that different treatment to two persons, both of whom are over the age limit, may violate equal protection.

Plaintiffs contend that it is at least a nonfrivolous question whether the New York State law is based on an

irrebuttable presumption about the capacity of a person aged 70 to continue in a judicial office, and, if so, whether that presumption may constitutionally serve to terminate his elected term prematurely on the ground that the elected official has suddenly become incapable of doing his job. Chief Justice Burger and Justice Rehnquist, dissenting in La Fleur, thought that that decision raised substantial questions on this point.

Appellees will doubtless argue that Weisbrod and McIlvaine foreclose a Fourteenth Amendment argument, whether based on due process (including irrebuttable presumptions) or equal protection. There is, however, a crucial distinction between Weisbrod and McIlvaine on the one hand, and this case on the other.

Irrebuttable presumptions are not automatically suspect. Rather, the irrebuttable presumption must affect a constitutional right. In La Fleur, the Court emphasized that it was dealing with "freedom of personal choice in matters of marriage and family life . . . one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." 414 U.S. at 641 . Accordingly, in its holding, the Court invalidated the regulations containing the presumption, not simply because there was a presumption nor

even because the presumption was irrebuttable, but "because [the regulations] employ irrebuttable presumptions that unduly penalize a female teacher for deciding to bear a child." 414 U.S. at 648 .

In Weisbrod and McIlvaine, the alleged irrebuttable presumptions affected only the more generalized interest in public employment. This case is closer to (if not stronger than) La Fleur than to Weisbrod and McIlvaine. Here, the alleged irrebuttable presumption affects the "fundamental" right to vote and, plaintiffs contend, the equally fundamental right to seek public office. These rights are protected by the First Amendment and their presence here distinguishes this case from McIlvaine. An irrebuttable presumption that affects these rights should be as carefully scrutinized as one that affects the "liberty" involved in La Fleur.

Plaintiffs contend that these differences put this case within the ambit of the La Fleur rationale, that they raise nonfrivolous questions, and that they substantially distinguish Weisbrod and McIlvaine.

(d) The State Law denies Zichello liberty and property - namely, his expectancy in completing his elected term and his right to it - without Due Process of Law.

Zichello's interest in his position and his expectancy in finishing his term are liberty and property within

the meaning of the Due Process Clause of the Fourteenth Amendment. In the case of judges, mandatory retirement at age 70 "bears no 'fair and substantial relation to the object of the legislation.'" Murgia v. Commonwealth of Mass. Bd. of Retirement, 376 F. Supp. 753, 754 (D. Mass. 1974) (3-Judge Court) quoting from F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) and Reed v. Reed, 404 U.S. 71, 76 (1971).

In Murgia, the Court struck down a provision requiring State Police members to retire at age 50 if they had completed 20 years of service. It found no rational relationship between the retirement age and the job's requirements. The same analysis should be done here - 50 is not 70, but judges are not policemen.

Other cases also support a holding that Zichello has a constitutionally protected interest in his office. Wieman v. Updegraff, 344 U.S. 183, 192 (1952). Turner v. Fouche, 396 U.S. 346, 362-63 (1970). Board of Regents v. Roth, 408 U.S. 564, 576-77 (1972). Schware v. Board of Bar Examiners, 353 U.S. 232, 238-39 (1957). Gordon v. Leatherman 450 F. 2d 562 (5th Cir. 1971) (elected official has property right in job.)

In Gordon, supra, the Court acknowledged that an elected official has a property right in his job. But it also held that the property right was subject to the political reality of recall. Plaintiffs do not challenge that result. The right of the people to recall an elected official is the other side of the First Amendment coin. Here, we do not have a recall situation. We have a per se exclusion imposed not by the body politic on a case by case basis, but by the State, across the board, regardless of what the voters may wish. The political legitimacy of recall raises entirely different issues from the ones raised by the constitutional legitimacy of mandatory age statutes.

Plaintiffs contend that by mandating retirement, the State denies Zichello his constitutional right to his elected office without serving any "fair and substantial" legislative purpose. Again, this raises important, nonfrivolous questions which should be resolved by a three-judge court.

CONCLUSION

The Order denying a three-judge court and dismissing the action should be reversed and the matter should be remanded for the convention of a three-judge court.

Since Judge Griesa has already expressed his opinion that the matter is frivolous, the case should be remanded to a different judge.

New York, New York
November 14, 1974

Respectfully submitted,

STEPHEN GILLERS
Attorney for Plaintiffs

Of Counsel

Stephen Gillers
Elliot A. Taikeff

APPENDIX TO BRIEF

The following is an analysis of the various State laws concerning judicial retirement requirements. It is taken from the Book Of The States, pages 126-132 (1974, The Council of State Governments).

The following states have mandatory retirement statutes for judges. Following each State is the age maximum and whether judges are appointed or elected. Where judges are elected by the legislature, they are called appointed. In some cases, a judge is appointed and then must run against his record periodically. If he is defeated, a new judge is appointed. Where this is so, it is indicated.

State	Maximum Age	Selection Method	Comment
Alaska	70	Appointed	Run against record
Colorado	72	Appointed	Run against record
Connecticut	70	Appointed	
Florida	70	Elected	But may complete term if more than half over
Hawaii	70	Appointed	
Idaho	70	Appointed	But may complete term if started before 70
Illinois	70	Elected	Run against record
Iowa	72	Appointed	Some run against record
Kansas	70	Elected & appointed	But may complete term if started before 70
Louisiana	75	Elected	
Maine	71	Appointed	
Maryland	70	Appointed	
Massachusetts	70	Appointed	
Michigan	70	Elected	But may complete term if started before 70
Missouri	70	Some appointed	No mandatory retirement for elected judges
Nebraska	70	Appointed	But may complete term if started before 70
New Hampshire	70	Appointed	
New Jersey	70	Appointed	
North Carolina	70, 72	Elected	
Ohio	70	Elected	But may complete term if started before 70
Oregon	75	Elected	
Pennsylvania	70	Elected	Run against record
South Carolina	72	Appointed	
Texas	75	Elected	
Utah	70, 72	Appointed	
Virginia	70, 75	Appointed	
Washington	75	Elected	
Wisconsin	70	Elected	
Wyoming	70	Appointed	

In the following additional states, failure to retire at the indicated ages results in loss of certain pension rights: Alabama (70), Arkansas (70), California (70), Minnesota (70), Montana (70), New Mexico (70), North Dakota (73), Tennessee (70). In all these states, judges are elected, except that in California and Tennessee, certain judges are appointed.

A few things are noteworthy. First, only in the following states must an elected judge retire before the end of his elected term: Illinois, Louisiana, North Carolina, Oregon, Pennsylvania, Texas, Washington, and Wisconsin. Other states with mandatory retirement statutes select judges by appointment.

Other states that elect judges permit them to complete their elected term even though they will be beyond the mandatory retirement age at its conclusion. These states are: Florida, Idaho, Kansas, Michigan and Ohio.

Furthermore, among the states that do require elected judges to retire at a certain age even if their term of office has not expired, there are the following characteristics that distinguish them from New York. In Illinois, though judges are elected, they thereafter only run against their record. The same is true for Pennsylvania. In

Louisiana, Oregon, Texas and Washington, the age maximum is 75.

Other than New York, the only states requiring elected judges to retire at age 70, excluding states where elected judges only run against their record to retain office, are North Carolina and Wisconsin.

States without mandatory retirement statutes are: Arizona, Delaware, Georgia, Indiana, Kentucky, Mississippi, Nevada, Oklahoma, Rhode Island, South Dakota, and West Virginia. In all these states, except Delaware and Rhode Island, all or most judges are elected.

In sum, then, states that elect judges overwhelmingly tend not to have mandatory retirement requirements.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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PIETRO C. RUBINO, for himself and all other persons similarly situated, et al.,

Plaintiffs-Appellants,

HARRY T. NUSBAUM,

Plaintiff-Intervenor-Appellant,

AFFIDAVIT OF SERVICE BY MAIL

Docket No. 74-2374

-against-

JOHN J. GHEZZI, et al.,

Defendants-Appellees.

- x

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

ANN M. GERLOCK, being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at 418 East 81 Street, New York, New York 10028.

On the 14th day of November, 1974, deponent served the within Brief for Plaintiffs-Appellants upon

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at the addresses designated by said attorneys for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in - a post office - official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Ann M. Gerlock

ANN M. GERLOCK

Sworn to before me this
14th day of November, 1974.

STEPHEN GILLERS
Notary Public, State of New York
No. 31-4507113
Qualified in New York County
Commission Expires March 30, 197..5